FRONT Report LINE

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LEGAL FRISKS

Search limited to weapons

One area of the law that often is misunderstood by law enforcement officers is when frisking is allowed.

The Attorney General's Office sees many cases in which officers believe they can frisk anyone they stop. This is not true.

Under *Terry v. Ohio*, a police officer may search someone for weapons if the officer has an articulable or reasonable fear that the individual may be armed. Whether called a frisk or a pat down, this is a search. The search, however, is limited to weapons.

Because the frisk exception was established in *Terry*, some officers believe they can frisk every time they make a *Terry* stop or an investigative detention. This is not true.

Just because an officer has sufficient facts to stop and detain a person does not justify a search. Justification for stopping the person, which is a seizure, is unrelated to justification for frisking, which is a search.

The only justification for a frisk is that the officer "has reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."

Also, an officer cannot frisk everyone he stops or puts into his patrol car as a matter of personal policy. There must be specific facts that cause the officer to fear a person may be armed.

If these facts exist, the officer may frisk the individual for weapons and may remove any item he feels or thinks may be a weapon. The officer also can search any items carried by an individual that may contain a weapon.

If an individual is in a vehicle when he is stopped or detained, and there exists an articulable fear that weapons may be present, an officer can ask the individual to exit the vehicle and then search the interior of the vehicle and the individual for weapons. However, the search of the interior is limited to areas within the reach and control of the person where a weapon could be obtained.

Again, this search is limited to weapons. Once an individual has been patted down and the officer is reasonably sure no weapon is present, the search must be terminated. This is true even if the pat down raises suspicions that there is other "evidence."

ATTORNEY GENERAL'S UPDATE

By Attorney General **Jay Nixon**

Increased training and improved coordination are two important goals for law enforcement in Missouri.

Last week, the Attorney General's Office joined with the Law Enforcement Training Conference to make significant progress toward meeting those goals by sponsoring the first-ever Attorney General's Law Enforcement training session.

I am grateful for the opportunity provided to our office to lead the training sessions and I appreciate the attention given to each session by the police chiefs, sheriffs and other law enforcement officials who attended.

Discussion at the conference focused on the accomplishments of the 1994 legislative session as they related to law enforcement. I am encouraged by several measures that made it through

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UPDATE: CASE LAWS

SUPREME COURT

State v. Jason Thomas Vanatter
No. 75607
(Mo.banc Jan. 25, 1994)

The court upheld the constitutionality of Section 574.093, "ethnic intimidation," under a challenge that the statute violated freedom of speech. The court held that the Missouri statute was similar to that upheld in *Wisconsin v. Mitchell*, 113 S.C. 2194 (1993). It noted that courts may properly take into account a defendant's racial animosity toward his victim as an aggravating factor for sentencing purposes.

Also, state and federal antidiscrimination laws that look to an actor's motive in determining culpability have been upheld against constitutional challenges. Section 574.093 was not aimed at prohibiting expression. It targets, and expressly requires, conduct that independently is subject to criminal sanction.

While Section 574.093 admittedly creates a motive-based crime, its practical effect is to provide added punishment for conduct that already is illegal but is seen as especially harmful because it is motivated by group hatred. Enhanced punishment for criminal conduct based on a defendant's motives of bias or hatred toward a protracted group is consistent with the U.S. Constitution.

State v. Steven M. Fuente
No. 75622
(Mo.banc Jan. 25, 1994)

A trooper initially had a legitimate reason to stop a vehicle for failure to signal and for speeding. The officer gained probable cause to search the vehicle when she smelled marijuana after the defendant lowered a window. Thus, there was sufficient evidence to support the trial court's finding that a search was proper and that the defendant's motion to suppress marijuana should have been overruled.

Once it was determined that 45 pounds of marijuana discovered in the vehicle was admissible, there was sufficient evidence to uphold the defendant's conviction of possession or having in his control more than 35 grams of marijuana. The vehicle, driven by the defendant, was titled in his mother's name, which created an implication that the defendant was in control of the vehicle. The defendant's conscious awareness of the marijuana further was established from testimony of a trooper who described a strong smell of marijuana.

State v. Steven M. Fuente
No. 75622
(Mo.banc March 22, 1994)

The court filed a modification of its Jan. 25, 1994, opinion. A trooper had probable cause to search a vehicle when she smelled marijuana upon first approaching the vehicle.

There was sufficient evidence to support the conviction of possession of more than 35 grams of marijuana. The vehicle, driven by the defendant, was titled in his mother's name, which created a clear implication that the defendant, not a co-defendant, was in control of the vehicle. Also, the trooper detected a strong smell of marijuana, which created an inference that the defendant was aware of marijuana.

WESTERN DISTRICT

State v. Israel Trujillo
No. W.D. 46122
(Mo.App., W.D. Feb. 1, 1994)

The court concluded that juror note taking is not prohibited in Missouri although it generally is thought to be impermissible. According to this court, it is within the trial court's discretion in Missouri to allow jury note taking. Accordingly, the court did not abuse its discretion in refusing to declare a mistrial when it learned a juror had been taking notes during the criminal trial.

State v. Ralph L. Miller
No. W.D. 46780
(Mo.App., W.D., en banc Feb. 15, 1994)

There was sufficient evidence on the issue of reasonable suspicion grounded in specific facts to support a *Terry* stop when the prosecutor called only the arresting officer at trial and did not call another member of an antidrug squad, which reported the driver's name, the vehicle's description and location, and that it supposedly was transporting drugs. Failure to call the officer who compiled the information to explain how he got it was not fatal to the state's case when the information was relayed by the leader of the arresting officer's squad, a veteran police officer experienced in narcotics investigation.

Thus, this information had a higher

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UPDATE: CASE LAWS

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degree of reliability than an unknown tipster. The court also found that the arresting officer had sufficient, reliable, and articuable information that created a reasonable suspicion of a crime being committed. The specific information given to the field officer by a fellow squad member justified the stop.

There is a number of concurring and dissenting opinions in this case.

There was vigorous discussion in the opinions whether the Supreme Court case of *State v. Franklin*, 841 S.W. 2nd 639 (Mo.banc 1992), was controlling in this case.

In *Franklin*, a field officer stopped a car based upon a dispatch that described the car as containing a legal weapon. There had been no evidence produced at the *Franklin* suppression hearing about the call, and without the arresting officer having independently observed any behavior amounting to reasonable suspicion, the initial stop was held invalid as well as the evidence obtained during the stop. Thus, failure to produce the dispatcher to testify on the basis of his information combined with the police's failure to observe behavior that would justify the stop was fatal to the state's case. The prevailing opinion was that the facts were distinguishable since the information in this case was more reliable than stops founded only on vague and non-detailed tips called by unknown tipsters.

State v. Gary Collins
No. W.D. 48205
(Mo. App., W.D. April 26, 1994)

In a prosecution for carrying a concealed weapon, the trial court erred in refusing to instruct the jury that it must find that the defendant "was not traveling in a continuous journey peaceably through the state." The trial court improperly concluded that "through the state" excluded intrastate travel. The court rejected the state's argument that the traveler exemption does not apply to intrastate journeys.

EASTERN DISTRICT

State v. Melvin Shelton
No. E.D. 61146
(Mo.App., E.D. Feb. 22, 1994)

The trial court properly admitted cocaine seized during an inventory search at the police station. The inventory search of the defendant's personal property was made pursuant to department policy. A subsequent search of the defendant after he had removed his personal belongings was to ensure he had not left any property on his body, including a weapon or contraband, with which the defendant could hurt himself in the holding cell. The contraband was found in the defendant's shoes. The officer had been instructed to thoroughly check shoes for smuggled contraband.

State v. Frank Noel
No. E.D. 63363
(Mo.App., E.D. March 8, 1994)

The trial court did not err in denying a mistrial when a police officer testified that he gave the defendant his Miranda rights. This was not an impermissible comment on post-arrest silence because there was no testimony that the defendant was asked by the police about the crime after arrest and after he gave Miranda warnings. He was not confronted with facts that might incriminate him if he remained silent, or facts that he needed to deny or explain. All that appeared from the record is that the defendant was silent following the arrest and the giving of his Miranda rights. It is permissible to ask if Miranda warnings were given.

State v. Morris Childs
No. E.D. 62487
(Mo.App., E.D. April 19, 1994)

The police had probable cause to arrest the defendant. While detectives were in a known crack house arresting the occupant, the defendant knocked on the door and said, "I've got the stuff. Let me

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ATTORNEY GENERAL'S UPDATE

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the session, including a "truth in sentencing" bill that was passed. The measure establishes guidelines for sentencing in a number of criminal cases and for other prison programs:

- Those convicted of a third violent crime would spend their entire sentence in prison.
- High-risk violent criminals also would spend their entire sentence in prison, regardless of number of convictions.
- A prison drug treatment program would be established that has an institutional and non-institutional phase. If a parolee fails to complete the non-institutional phase, he could be sent back to prison.
- All general population inmates would be required to follow a schedule of work and rehabilitative programs that can include academic courses, vocational training, substance abuse treatment programs and employment in prison industries.

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UPDATE: CASE LAWS

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in." When the detective opened the door, the defendant reached into his pocket and began pulling a plastic bag out of his pocket. The detective grabbed the defendant's arm and removed from his pocket a bag containing 15 pieces of crack cocaine. The defendant stated,"You guys caught me with the crack cocaine in my pocket. I was just delivering it to this house." Having found the arrest to be valid, the search and seizure incident was valid.

SOUTHERN DISTRICT

State v. Patrick Malaney
No. S.D. 18468
(Mo.App., S.D. March 9, 1994)

The trial court did not err in admitting evidence of contraband that was discovered during a search of a vehicle because the trooper had probable cause to stop the vehicle.

The erratic moving and weaving of the vehicle justified the stop. It is troubling that this opinion discusses the pretextual arrest doctrine as still binding in Missouri although that doctrine has been eliminated.

The court found that the stop was not pretextual because, viewed objectively, the movements of the vehicle could lead a reasonable officer to believe the driver was drunk, asleep or, for some reason, inattentive.

Note that the Missouri Supreme Court eliminated the pretexual arrest doctrine in *State v. Mease.*

State v. Dennis R. Luker
No. S.D. 18822
(Mo.App., S.D. March 31, 1994)

There was insufficient evidence of the defendant's guilt of unlawful use of a weapon by knowingly carrying a concealed weapon. There was no proof a "scratch awl" was a weapon, although it was readily capable of lethal use and was concealed on the defendant's person.

A scratch awl is not one of the weapons listed in Section 571.030(1). It is an everyday instrument and although it readily may be capable of lethal use, it becomes so only if used or carried for use as a weapon. There was no evidence the awl was used as a weapon.